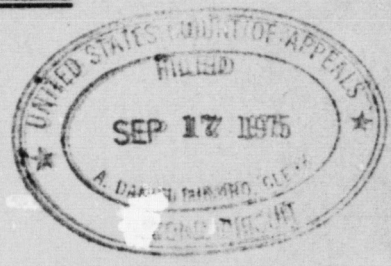
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7452



IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 75-7452

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED
Plaintiff-Appellant,

against

ANASTASIOS ALEXIOU, a/k/a TASSOS ALEXIOU,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Appellant Merrill Lynch, Pierce, Fenner & Smith Incorporated appeals from the judgment entered in the United States District Court for the Southern District of New York on July 16, 1975 dismissing the complaint in this action, without prejudice, for lack of jurisdiction over the person of the defendant-appellee. The Memorandum and Order of the Honorable Whitman Knapp in the Court below has not yet been officially reported. It has been unofficially reported in CCH Commodity Futures Law Reporter ¶20,061 (S.D.N.Y. 1975).

Questions Presented

1. If a foreign principal employs a New York agent, and orders that agent to act for him in New York, may the acts of the agent in compliance with the principal's orders be imputed to the principal for the purpose of subjecting him to personal jurisdiction in New York in an action by the agent against the principal?

2. Has the defendant-appellee consented to personal jurisdiction in New York by signing an agreement to arbitrate all disputes before the New York Stock Exchange, Inc.?

3. Has the defendant-appellee consented to personal jurisdiction in New York by representing to a Court in Greece, his own homeland, that the entire dispute between the parties would be decided in New York, thereby causing the Greek Court to decline jurisdiction?

4. Did the Court below err in dismissing this action *in toto* for lack of personal jurisdiction over the defendant-appellee, despite the fact that this action is in the Federal Courts on defendant-appellee's petition for removal of the action from the Supreme Court, New York County, filed after plaintiff-appellant obtained and perfected an attachment under C.P.L.R. §6201 and thereby established *quasi in rem* jurisdiction in the Court?

Statement of the Case

On October 18, 1974 defendant-appellee Anastasios Alexiou ("Alexiou"), a resident of Athens, Greece, opened a commodities account with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") through the London office of Merrill Lynch, Pierce, Fenner & Smith, Ltd. ("Merrill Lynch Ltd."), an affiliated corporation registered in England which services the accounts of individuals overseas who wish to deal with Merrill Lynch, a Delaware corporation with its principal place of business in New York. (26a)*

At or about the time he opened his account, Alexiou signed a Commodity Account Agreement with Merrill Lynch providing for arbitration before the New York Stock Exchange and governed by the laws of the State of New York. It reads in part as follows:

> "It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any Security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange). Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal.

* Reference in parenthesis is to the parties' Joint Appendix on appeal by page number.

"This agreement and its enforcement shall be governed by the laws of the State of New York." (85-86a)

Alexiou engaged Merrill Lynch as a broker to purchase for his account 60 contracts of New York Sugar 11 during October, 1974. On November 7, 1974 Alexiou had an additional 100 contracts of New York Sugar 11 transferred into his Merrill Lynch account from another broker. Alexiou ordered Merrill Lynch to purchase an additional 40 contracts of New York Sugar 11 on November 8, 1974. (27a)

The New York Sugar 11 contract is a contract for delivery, on a specific date in the future, of 50 long tons (2,240 pounds each) of sugar F.O.B. certain Carribean ports. (32a) The price of this contract is quoted in cents per pound of sugar. This contract may be traded only in New York City on the New York Coffee & Sugar Exchange, which is located at 79 Pine Street, New York, New York. (27a) In this case, Alexiou specifically ordered Merrill Lynch to buy and to accept delivery of New York Sugar 11 for his account, rather than any other type of sugar contract, such as might be traded in London or elsewhere. (27a)

Alexiou's investment in New York Sugar 11 was substantial. The 200 contracts of New York Sugar 11 which he held at the close of business on November 8, 1974 represented 10,000 long tons of sugar, worth approximately $11,043,200 at the then prevailing price of 49.3 cents per pound. Alexiou ordered many transactions in New York Sugar 11, all of which are shown on his monthly statements. (33-58 a)

On December 3, 1974, Alexiou went to the London office of Merrill Lynch Ltd. and held a telephone conversation with the Merrill Lynch sugar specialist at the Merrill Lynch office in New York. (27a) The office manager and an account executive in London participated in the telephone conversation. The New York sugar specialist maintained an open telephone line to the trading floor of the Coffee & Sugar Exchange. During the course of that one telephone call, the specialist relayed market information to Alexiou, Alexiou placed an order to sell 25 contracts of New York Sugar 11, the order was executed on the trading floor and a report of this execution was immediately given to Alexiou. (27a)

The market price of sugar began to decline precipitously in late November. After Alexiou failed to supply necessary margin, his account was completely liquidated in December, 1974. He failed to pay the resulting debit balance of $1,247,185, despite Merrill Lynch's demand (11a), and Merrill Lynch commenced this action in Supreme Court, New York County, by obtaining an order of attachment under C.P.L.R. §6201 against Alexiou on December 24, 1974, based upon a cause of action for money damages against a non-resident. (3a)* Merrill Lynch thereafter served the summons and complaint personally on Alexiou in Greece on January 21, 1975. (13a)

* This order of attachment has been levied upon an account in a corporate name at Bache & Company containing $500,000. Merrill Lynch contends that this account is the property of Alexiou. The question of the ownership of this account is still in litigation in a special proceeding in Supreme Court, New York County. (69a)

Subsequently, Alexiou removed this action to the District Court on February 20, 1975. (14a) Merrill Lynch moved to stay the action and to compel arbitration before the New York Stock Exchange in accordance with its arbitration agreement, and Alexiou cross-moved to dismiss the action for lack of jurisdiction over his person. (20a) The Court below granted Alexiou's motion to dismiss the complaint. It took no action on Merrill Lynch's motion to compel arbitration, other than to note that its dismissal was "without prejudice to [Merrill Lynch's] right, if any, to seek appropriate relief under the C.P.L.R." (94a, 101a, footnote 3)

On February 19, 1975, while the action below was pending, Merrill Lynch commenced an ancillary proceeding in Greece in order to obtain a pre-notification mortgage, a form of pre-judgment security interest, on Alexiou's real property in Greece. (63a) On March 19, 1975, when that proceeding came on for a hearing before the Greek Court and prior to the decision below, Alexiou argued that the Greek Court should not take jurisdiction over Merrill Lynch's petition, representing to that Court that the entire matter would be determined in New York in accordance with the arbitration agreement between the parties:

> "[I]t is stipulated that any dispute between us, arising out of our transactions, shall be referred to arbitration to be conducted in accordance with the conditions and rules of the New York Stock Exchange ... Therefore, [this dispute is] to be examined at depth under the laws and exclusively by authorized organs nominated by the litigants...

> That is to say, the task is assigned to this Court to investigate into a case, which under the agreement, has been assigned to a foreign Arbitration Court..." (emphasis added, translated from Greek) (76-77a)

Relying on this representation, the Greek Court decided to abstain and to await the decision from New York. It therefore dismissed Merrill Lynch's petition. (91-92a)

In its endorsed memorandum denying Merrill Lynch's motion under F.R. Civ. P. 59(e), which again raised Alexiou's inconsistent position in the Greek proceeding, the Court below stated that, although the issue raised had not been mentioned in its prior opinion, it had been "carefully considered and found to be untenable." (109a)

The Notice of Appeal from the judgment below was filed on July 29, 1975. (110a)

POINT I

ALEXIOU IS SUBJECT TO JURISDICTION IN NEW YORK BECAUSE OF HIS TRANSACTION OF BUSINESS HERE

A. Alexiou Deliberately Chose To Transact A Substantial Quantity Of Business In New York

Alexiou is subject to jurisdiction in New York under the provisions of New York's long-arm statute, which reads in part as follows:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent:
>
> 1. transacts any business within the state; ..." C.P.L.R. §302(a)(1).

There can be no doubt as to the substantial quantity of the business which Alexiou deliberately conducted in New York. By November 8, 1974, he had purchased [illegible] of 200 contracts of New York Sugar 11, a contract which can only be purchased and sold in New York. Each contract was an agreement to deliver 50 long tons of sugar, thereby constituting a total investment by Alexiou in 10,000 long tons of sugar, worth about $11,043,200 on November 8. Between November 8, 1974 and November 20, 1974, the sugar market advanced sharply and Alexiou engaged in "switching", i.e., selling approximately 160 New York Sugar 11 contracts with more distant maturities and purchasing an equal number of New York Sugar 11 contracts with nearer maturities.

Alexiou was aware that he was dealing with Merrill Lynch in New York, as is shown by his signing several agreements with Merrill Lynch and by his signing a letter of

instructions, specifically addressed to Merrill Lynch's New York office to receive certain New York Sugar 11 contracts from another broker. (28-31a)

A non-resident subjects himself to personal jurisdiction in the forum state when he "purposefully avails [him]self of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958), quoted in Parke-Bernet Galleries Inc. v. Franklyn, 26 N.Y.2d 13, 18, 308 N.Y.S.2d 337, 341, 256 N.E.2d 506, 508-509 (1970). Here Alexiou personally and repeatedly gave orders to enter into transactions for his account and risk which could only be effected in New York. He gained the benefits and protection of the laws of the State of New York, including the right to compel Merrill Lynch to abide by its agreements with him, including the arbitration agreement between the parties, the right to enforce the terms of the commodity contracts he was buying and, perhaps most important, the right to conduct business and earn profits on New York Sugar 11 in American dollars, rather than pounds sterling or drachmas.

Alexiou has asserted that he was not physically present in the State of New York when he transacted business with Merrill Lynch Ltd. or with Merrill Lynch. (22-23a) However, physical presence is certainly not required in order to transact business in the State within the meaning of CPLR §302. The New York Court of Appeals has emphasized this point as follows:

"It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 for, particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State. ... Any implication, in older cases, that physical presence was a necessary factor in obtaining jurisdiction over nonresidents was expressly rejected by the Supreme Court in the International Shoe case -- the case which provided the constitutional authority for CPLR 302." Parke-Bernet Galleries v. Franklyn, supra, 26 N.Y.2d at 17, 308 N.Y.S.2d at 340, 256 N.E.2d at 508 (1970).

The Court below erroneously cited Hertz, Newmark & Warner v. Fishman, 53 Misc.2d 418, 279 N.Y.S.2d 97 (Civ. Ct. N.Y. Co. 1967), apparently for the proposition that a non-resident who deals with a New York broker does not subject himself to personal jurisdiction in New York. (96a) This case is easily distinguishable from the present facts because, unlike Alexiou, the defendant Fishman never asked the plaintiff to take any action in New York:

"At no time had the defendant ever specified where the stocks were to be bought or where they were to be sold. The defendant would telephone the plaintiff's representative at its Newark office to buy or sell a particular stock." 53 Misc.2d at 419, 297 N.Y.S.2d at 99. (emphasis added)

Much more to the point is F.I DuPont v. Chelednik, 69 Misc.2d 362, 330 N.Y.S.2d 149 (App. T. 1st Dept. 1971), a more recent case by a superior Court, in which the defendant was a customer of the plaintiff who "traded on New York stock exchanges through plaintiff". 69 Misc.2d at 362. The Court found this activity to be sufficient for purposes of personal jurisdiction:

> "[O]peration of the account in New York constituted the transaction of business in New York. One need not be physically present in New York to be subject to the jurisdiction of our courts under CPLR 302. One 'can engage in extensive purposeful activity here without ever actually setting foot in the State' (Parke-Bernet Galleries v. Franklyn, 26 N Y 2d 13, 17)." 69 Misc. 2d at 363, 330 N.Y.S.2d at 150.

The extensive nature of Alexiou's activities in New York prompted Mr. Justice Korn of the Supreme Court, New York County, to remark in dicta in the course of an attachment turnover proceeding that "jurisdiction was obtained over Alexiou under CPLR §302(a)(1)." (70a)

The essential error committed by the Court below in denying jurisdiction over Alexiou was its losing sight of the extensive, purposeful activity deliberately transacted by Alexiou in the State of New York. Instead, it focused on the fact that Alexiou was not physically present in New York, and erroneously failed to consider for jurisdictional purposes the acts which Alexiou caused Merrill Lynch to perform in New York on his behalf.

B. Alexiou Is Subject To Jurisdiction In New York Under The Parke-Bernet Case

The result in this case is determined by the facts of Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970).

In Parke-Bernet, defendant Franklyn, a resident of California, received a catalog from the plaintiff describing a forthcoming art auction in New York. Pursuant to Franklyn's request, telephone contact was established between himself, in

California, and an employee of Parke-Bernet in New York during the course of the auction. The Parke-Bernet employee gave Franklyn information on the other bids that were being made, and relayed bids from the defendant to the auctioneer. By this method, defendant purchased two paintings during the course of the auction.

Franklyn subsequently failed to pay for the paintings, and Parke-Bernet brought an action against him in the New York Supreme Court. Franklyn moved to dismiss the complaint for lack of jurisdiction over his person, but the New York Court of Appeals ultimately determined that the defendant had submitted to jurisdiction in New York by transacting business within the State.

In the case at bar, jurisdiction is similarly established by the December 3, 1974 telephone conversation between Mr. Alexiou in London and Merrill Lynch's sugar specialist in New York. Throughout the transaction in question, the New York specialist was constantly linked by an open telephone line to the trading floor of the Coffee & Sugar Exchange at 79 Pine Street. Alexiou received information on market activity and gave orders which were passed on to the trader. Orders were executed and reported back to Alexiou while he was still on the phone. In this manner, Alexiou actually sold twenty-five New York Sugar 11 contracts during the course of this telephone conversation. By means of the telephone, both Alexiou and Mr. Franklyn transacted business in the State of New York just as certainly as if they had been physically present here.

Despite the similarity between the facts of this case and the facts in Parke-Bernet, the Court below, it is submitted, erroneously distinguished Parke-Bernet on three grounds. The Court below first stated:

> "[T]here is no claim here that plaintiffs set up any particular telephone line for defendant's exclusive use. On the contrary, all plaintiff is claimed to have done was allow defendant to use one of its regular telephones for as long as it took to consummate the sale of the contracts in question." (99a)

The point of Parke-Bernet was that one can do business in New York by telephone, without coming here in person. It should not matter which telephone the defendant used, or what technical preparations were made for the call. The import of the Parke-Bernet case lies in what was said and done by the defendant over the telephone.

The Court below next observed that there was no "claim that such sale had any significant effect on the day's activity on the Exchange floor." (99a) Alexiou, on this occasion, sold 25 sugar contracts, aggregating 1,250 long tons of sugar, at an average price of 23.85 cents per pound representing a total of $667,867.20 worth of sugar. At the Parke-Bernet auction, Mr. Franklyn bought two paintings for a total cost of $96,000. The Parke-Bernet opinion nowhere mentions the total number of paintings sold at the auction or the total volume of business done by Parke-Bernet that day. The significant fact is that both Alexiou's sale and Franklyn's purchase were made in auction markets, where prices are determined by all of the bids on the trading

floor and one person's "active participation in the bidding" effects "not only the plaintiff but all those who were in the auction room". 26 N.Y.2d at 18.

The third observation by the Court below is that "it is not claimed that any of the employees of plaintiff necessary to consummate the sale were exclusively assigned to defendant for any specified period of time". (99a) Merrill Lynch's employees in New York obviously gave Mr. Alexiou their full time and attention during the period necessary to consummate his sales. In Parke-Bernet the Court of Appeals deliberately focused on "the realities of what [Parke-Bernet's employee] actually did on the night of the sale", describing him simply as the "assistant and messenger" of the defendant. 26 N.Y.2d at 19. The duration, quality or exclusivity of his services were not in issue. The point in this case is that Alexiou called New York and, with the assistance of Merrill Lynch's employees, participated as closely as he could in the auction market in New York. Cf. Cofinco, Inc. v. Angola Coffee Co., A.C., CCH 1975-2 Trade Cases ¶60,456 (S.D.N.Y. 1975).

C. A Non-Resident Can Act Through An Agent, And Those Acts, If Authorized, Are Imputable To The Non-Resident For Jurisdictional Purposes

As is shown above, a non-resident subjects himself to jurisdiction in New York by transacting business here "in person or through an agent". CPLR §302(a)(1). The Court below ruled that Merrill Lynch could not assert the activities which it performed in the State of New York as Alexiou's agent and at his express order for the purpose of showing

that Alexiou had transacted business here. The Court noted that Alexiou was not physically present in New York, and considered itself bound to apply the following purported rule:

> "[I]n an action by an agent against his foreign principal, the acts of the agent can never be attributed to the foreign defendant for jurisdictional purposes." (97a)

This is simply not the law of the State of New York. The acts of a New York agent can and should be attributed to a foreign principal when that principal has ordered the agent to act in New York on his behalf.

The Court's ruling was apparently based on footnote 2 to the opinion in Parke-Bernet Galleries, Inc. v. Franklyn, supra, and a four-line reversal by the Court of Appeals in the case of Harr v. Armendaris Corp., 31 N.Y.2d 1040, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973). The reversal in Harr was "on the dissenting opinion at the Appellate Division", which in turn was based upon Parke-Bernet footnote 2. Parke-Bernet footnote 2 is as follows:

> "The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. (See Glassman v. Hyder, 23 N Y 2d 354; Standard Wine & Liq. Co. v. Bombay Spirits Co., 20 N Y 2d 13; McKee Elec. Co. v. Rauland-Borg Corp., 20 N Y 2d 377, supra; Kramer v. Vogl, 17 N Y 2d 27.) It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the plaintiff was relying on his own activities within the State, and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent." 26 N.Y.2d at 19, 308 N.Y.S.2d at 341-342, 256 N.E.2d at 509, n. 2. (emphasis added)

Here, Merrill Lynch is indeed suing Alexiou for the debit which arose as a result of his transactions "with third parties" on the Coffee & Sugar Exchange. It is not simply suing for its compensation, or for some other privilege allegedly owed it by a foreign principal, as were the plaintiffs in Haar and in the cases cited in the Parke-Bernet footnote. The mere fact that Merrill Lynch completed all of Alexiou's exchange transactions, thereby sparing the third parties the effects of Alexiou's default, should not immunize Alexiou from having to answer for his default in New York.

Neither Parke-Bernet footnote 2 nor the four cases cited therein are authority for the purported rule applied by the Court below. In Parke-Bernet the Court of Appeals found that the defendant had transacted business in New York and was subject to jurisdiction, under facts remarkably similar to those in the case at bar, as discussed above.

None of the four cases cited in footnote 2 forbade a plaintiff-agent from imputing his own acts to an absent principal. These cases all involved a failure of proof that the plaintiff's activity in New York was in fact conducted as agent for the defendant, rather than for the plaintiff's own purposes. In Glassman v. Hyder, 23 N.Y.2d 354, 296 N.Y.S.2d 783, 244 N.E.2d 259 (1968), the plaintiff real estate broker, who telephoned the defendants in New Mexico and offered to find a buyer for the defendants' New Mexican real property, failed to show that he was ever authorized by

the defendants to act on their behalf. Standard Wine & Liquor Co. Inc. v. Bombay Spirits Co. Ltd., 20 N.Y.2d 13, 281 N.Y.S.2d 299, 228 N.E.2d 367 (1967), McKee Electric Co. Inc. Rauland-Bord Corp., 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 (1967), and Kramer v. Vogl, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966), were all suits by a plaintiff-distributor against an absent wholesaler. In each, the plaintiff failed to prove that he was the agent of the absent defendant, rather than an independent contractor. None of these actions arose out of an agent's transactions with third parties on behalf of an out-of-state defendant.

Therefore, Parke-Bernet footnote 2 would not disqualify a true agent from subjecting his foreign principal to jurisdiction on the basis of the agent's acts which were authorized or ordered by the foreign principal. Under footnote 2, the plaintiff's acts will be held insufficient to confer personal jurisdiction over the defendant only if such acts are entirely the plaintiff's own independent acts and it is not shown that the defendant has purposely engaged the plaintiff to act for him in New York. See, generally, Note, New York's Long-Arm Jurisdiction: The Case For The Agent-Plaintiff, 41 Bklyn. L. Rev. 625 (1975).

The Harr reversal adds nothing to this rule. The plaintiff in Harr was an attorney who was suing his out-of-state client for his own attorneys' fees, not for a debt incurred in a transaction with a third party. An attorney has traditionally been regarded as an independent

contractor, rather than as the agent of his client. Under traditional New York law, an attorney cannot premise jurisdiction over his client upon the attorney's own acts. See Perlman v. Martin, 70 Misc.2d 169, 332 N.Y.S.2d 360 (Sup. Ct. Nassau Co. 1972); 41 Bklyr. L. Rev. 625, 644. Moreover, plaintiff's proof of his activity on behalf of his client was found to be insufficient. In the opinion adopted by the Court of Appeals, it was pointedly observed that the plaintiff failed to submit an affidavit of his own, and that the only affidavits submitted were conclusory affidavits "of an attorney who claims to have been 'engaged as associate attorney in the matter by plaintiff.'" 40 App. Div. 2d at 770, 337 N.Y.S.2d at 287.

Cases decided since Harr also show that there is no rule against a plaintiff-agent founding jurisdiction over his principal in New York based upon the agent's acts in furtherance of the agency. In Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 347 N.Y.S.2d 47, 300 N.E.2d 421 (1973), decided by the Court of Appeals shortly after its reversal in Harr, a New York advertising agency was permitted to implead the non-resident president of one of its corporate clients. This individual denied that he had ever done business in New York as an individual. Rather than applying any absolute rule, the Court of Appeals premised its decision on the total circumstances of the case, including the fact that the advertising agency's services were to be performed entirely in New York:

> "We agree with Justice Hopkins, dissenting below, that, 'On the total facts' and '[l]ooking at the transaction as a whole,' Schuminsky engaged in 'that kind of purposeful activity * * * which satisfies the statute [CPLR 302] and renders it reasonable that [he] should answer in New York in the compass of the action which was brought by the corporation of which [he] is president' ... Certainly, Schuminsky's 'contacts' with this state were such 'that the maintenance of the [third-party] suit does not offend "traditional notions of fair play and substantial justice."' (International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95; see, also, McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed. 223.)" 32 N.Y.2d 587, 347 N.Y.S.2d 50-51.

Similar attention was given to the totality of the facts in Margaret Watherston, Inc. v. Forman, 70 Misc.2d 539, 334 N.Y.S.2d 35 (Civ. Ct. N.Y. Co. 1972), aff'd, 73 Misc.2d 875, 342 N.Y.S.2d 744 (App. T. 1st Dept. 1973). In that case, the non-resident defendants shipped a painting to the plaintiff in New York for restoration and later refused to pay for the work. The Court, citing Parke-Bernet, reasoned that the giving of an order in New York, the rendition of services here and the shipment of goods here combined to support personal jurisdiction over the defendants. It found:

> "[D]efendants have deliberately opted to take advantage of the facilities available here. Accordingly, it is not oppressive that defendants be required to account for their activities before our Court." 334 N.Y.S.2d at 37 (citations omitted).

It should be noted that this case was affirmed three months after the Court of Appeals' reversal in the Harr case.

One case which followed Harr in denying jurisdiction over a non-resident defendant nevertheless restated the rule concerning plaintiff-agents in terms completely different from the absolute rule applied by the Court below:

> "[D]efendant exercised no control or dominion over plaintiffs' activities in New York ... The independent acts in New York for their own purposes by residents in a contract relationship with a non-resident person or corporation in another State may not be attributed to the non-resident so as to become the acts of the non-resident within New York (Haar v. Armendaris Corporation, 31 N.Y.2d 1040, 342 N.Y.S. 2d 70, 294 N.E.2d 855 ...)" DelBello v. Japanese Steak House, Inc., 43 App. Div.2d 455, 352 N.Y.S.2d 537, 540 (4th Dept. 1974). (emphasis added)

The rule of Parke-Bernet and Harr is not an absolute rule against plaintiff-agents, as the Court below believed. It is rather an admonition that the acts upon which jurisdiction is premised should not be the completely unilateral acts of a plaintiff who was acting for his own purposes. They must rather be acts which were purposely intended by the absent principal to be carried out in New York on his behalf. Nothing in those cases suggests that one who directs a broker to undertake a transaction on his own behalf and then refuses to pay, is immune from suit in the jurisdiction in which the transaction occurs.

Such a rule is quite sensible. It prevents plaintiffs from bootstrapping themselves into jurisdiction over a

foreign defendant by performing acts in the forum for the purpose of gaining jurisdiction. On the other hand, it prevents a defendant from escaping from jurisdiction if he orders his agent to act in New York. This is in fulfillment of the observation of the Supreme Court in Hanson v. Denckla, supra:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

Merrill Lynch's activity in executing Alexiou's orders on the New York Coffee & Sugar Exchange were carried out as his agent and under his control. Alexiou purposely and deliberately acted in New York. Merrill Lynch had no discretion in carrying out his orders. Specifically, it had no discretion whether to act in New York or in some other place, as the plaintiff did in Hertz, Newmark & Warner v. Fishman, supra.

In summation, Alexiou conducted a substantial quantity of business which he could only have conducted in New York. He is therefore subject to personal jurisdiction in New York, and in the Court below.

POINT II

EVEN IF ALEXIOU HAD NOT TRANSACTED BUSINESS IN NEW YORK, HE CONSENTED TO JURISDICTION BY AGREEING TO ARBITRATE HERE

When Alexiou opened his commodities account with Merrill Lynch, he signed an agreement to arbitrate any controversy between himself and Merrill Lynch before the New York Stock Exchange. The law is clear that a written agreement to litigate or arbitrate in a given jurisdiction is enforceable and is a consent to personal jurisdiction in the place selected. The Court below, which did not discuss this point, erred in not holding that this was an independent basis for personal jurisdiction over Alexiou.

In National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), the defendants signed an equipment lease containing a provision nominating an individual in New York as their agent for service of process. The Supreme Court found that the defendants had validly consented to personal jurisdiction in the State of New York:

> "The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York ... And it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." 375 U.S. at 315-316.

In The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972), the Supreme Court enforced a forum selection clause between a German corporation and an American corporation which provided that any dispute arising between them would be litigated before the "London Court of Justice".

Most recently, the Supreme Court upheld an arbitration agreement in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). There Alberto-Culver purchased the stock of certain businesses from Scherk, a German national. The purchase contract contained a clause providing for arbitration of any dispute before the International Chamber of Commerce at Paris, France. After the sale had been completed, Alberto-Culver brought suit against Scherk in a Federal District Court in Illinois, alleging fraudulent misrepresentations under the federal securities laws. Scherk moved to stay the action pending arbitration.

The Supreme Court ordered the action stayed, finding that the arbitration agreement was a valid forum selection clause that should be enforced:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S. at 519.

Another cogent reason the Court gave for enforcing the contractual provision was that the parties' access to courts in various countries might lead to jockeying for position and to inconsistent adjudications, thereby creating a "no man's land":

> "[T]he dicey atmosphere of such a legal no man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S. at 517.

This Court has also held that an agreement to arbitrate constitutes a consent to personal jurisdiction in the place selected. In Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), this Court stated:

> "The district court went on to hold that objections by Solitron on the basis of lack of jurisdiction were frivolous because it had agreed in the original agreement to submit to arbitration in Curacao and that the laws of the Antilles should be applicable ... In this respect the district court was clearly correct." 489 F.2d at 1317.

The same rule was also stated in Burger Chef Systems, Inc. v. Baldwin, Inc., 365 F. Supp. 1229 (S.D.N.Y. 1973):

> "In addition to the methods for obtaining personal jurisdiction provided by the federal rules and by state statutes, Courts have repeatedly held that a party may by agreement consent to the jurisdiction of a Court which would not otherwise have authority over him. Thus, for example, New York residents who executed a contract under which differences were to be 'arbitrated at London pursuant to the Arbitration Law of Great Britain' were held to have an 'implied submission to the terms of the act itself, and to any rules or procedural machinery adopted by competent authority in aid of its provisions.' Gilbert v. Burnstine, 255 N.Y. 348, 358, 174 N.E. 706, 709 (193[illegible]." 365 F. Supp. at 1232.

As the Burger Chef opinion points out, New York law and Federal law are in accord on this basic proposition. See Gilbert v. Burnstine, supra; Matter of Liberty Countrywear (Riordan Fabrics Co.), 197 Misc. 581, 96 N.Y.S.2d 134 (Sup.

Ct. N.Y. Co. 1950); Zim Israel Navigation Co. v. Sealanes International, 17 App. Div.2d 393, 235 N.Y.S.2d 296 (1st Dept.), aff'd, 13 N.Y.2d 714, 241 N.Y.S.2d 845, 191 N.E.2d 902 (1962); Domke, The Law and Practice of Commercial Arbitration, 154-155 (1968).

Therefore, it must be concluded that Alexiou has consented to jurisdiction in New York by signing the arbitration agreement, and the Court below should have so found.

POINT III

ALEXIOU HAS CONSENTED TO JURISDICTION IN NEW YORK BY REPRESENTING TO A GREEK COURT THAT THIS DISPUTE WOULD BE ARBITRATED IN NEW YORK

In this case we not only have Alexiou's agreement to arbitrate this dispute before the New York Stock Exchange, we also have his successful assertion to a Court in his own homeland that that Court should not take jurisdiction because the entire dispute would be arbitrated in New York in accordance with the written arbitration agreement between the parties.

Alexiou has obviously attempted, with some success, to play one Court off against another and thereby to avoid litigating this matter in any forum. He has already created the exact "legal no-man's land" which the Supreme Court in Scherk was trying to avoid. He utilized the jurisdiction of the Court below as a tool to dismiss the Greek proceeding and then moved to dismiss this action in the Court below. These actions, without more, amount to a consent to personal jurisdiction in New York, and the Court below should have so held.

Such attempts to trifle with the jurisdiction of federal courts have not been tolerated. In Di Frischia v. New York Central Railroad, 279 F.2d 141 (3d Cir. 1960), the defendant railroad sought to change a prior stipulation as to certain jurisdictional facts. The Court held that such a change would not be countenanced:

> "Allowance of such an amendment under the circumstances would be an abuse of discretion...A defendant may not play fast and loose with the judicial machinery and deceive the courts." 279 F.2d at 144.

In similar cases of deception New York Courts have also found that foreign entities may become subject to suit in New York by estoppel. In Society Milion Athena Inc. v. National Bank of Greece, 166 Misc. 190, 2 N.Y.S.2d 155 (Sup. Ct. N.Y. Co. 1937), one Greek bank held itself out as the branch of another Greek bank which did business in this country. It was estopped from denying that the other bank was its agent for service of process:

> "It is true that mere advertisement by a foreign corporation does not itself constitute 'doing business' for the purpose of service of process...These advertisements, however, indicate that the National Bank of Greece intended our citizens to believe that the Hellenic Bank Trust Company was a branch of the Bank doing its business in this country. Having held the trust company out as such, and intending to induce the deposit of moneys in reliance thereon, the National Bank of Greece is estopped from now denying that the Hellenic Bank Trust Company is its agent upon whom effective service of process can now be made." 166 Misc. at 200, 2 N.Y.S.2d at 164.

Finally, in Farmingdale Steer-Inn, Inc. v. Steer-Inn Realty Corp., 51 Misc.2d 986, 274 N.Y.S.2d 379 (Sup. Ct.

Nassau Co. 1966), the defendant represented to the plaintiff that it had filed a certificate of doing business in the State of New York and had thereby submitted itself to jurisdiction in this State. The Court found that the defendant was estopped from denying jurisdiction in the State of New York, relying on the equitable principle that a party will not be permitted to take advantage of its own wrongs.

This Court should therefore hold that, regardless of whether Alexiou transacted any business in the State of New York through Merrill Lynch as his New York agent, he has consented to jurisdiction here by reaffirming his arbitration agreement in the fraudulent statement which he made to the Greek Court.

POINT IV

THE COURT BELOW ERRED IN DISMISSING THE ACTION IN TOTO, WITHOUT PRESERVING QUASI IN REM JURISDICTION PURSUANT TO MERRILL LYNCH'S ATTACHMENT OF ALEXIOU'S PROPERTY OBTAINED PRIOR TO REMOVAL UNDER C.P.L.R. §6201

The Court below dismissed the action in toto for lack of personal jurisdiction over the defendant. This was completely improper because it failed to give effect to the attachment of Alexiou's property obtained by Merrill Lynch under C.P.L.R. §6201 prior to removal of the action to the Federal Court (3a), and Merrill Lynch's levy thereunder. (66-72a) Although, as demonstrated above, we believe that Alexiou is subject to personal jurisdiction in the State and Federal Courts of New York by reason of his transaction

of substantial business here, by his consenting to arbitrate his dispute here and by his representing to the Greek Courts that it would be so arbitrated here, we certainly believe that the Court should not have dismissed the action insofar as it was premised upon the attachment obtained prior to removal under C.P.L.R. §6201, based upon a cause of action for money damages against a non-resident. At the very least, this Court should reverse the order below to continue the action based on quasi in rem jurisdiction obtained prior to removal.

CONCLUSION

The judgment of the Court below dismissing this action for lack of personal jurisdiction over the defendant should be reversed and the action remanded to the District Court, either on the basis that the defendant is subject to the personal jurisdiction of the Court or, in the alternative, that Merrill Lynch's attachment, obtained prior to removal of the action to the Federal Court, would support that Court's quasi in rem jurisdiction.

Dated: New York, New York
September 17, 1975

Respectfully submitted,

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